

4/23/01

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Hearing:
February 14, 2001

Paper No. 17
AFD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ladex Corporation

Serial No. 75/310,166

George W. Lewis of Jacobson, Price, Holman & Stern, PLLC
for Ladex Corporation.

Susan Leslie DuBois, Trademark Examining Attorney, Law
Office 111 (Craig Taylor, Managing Attorney).

Before Hanak, Rogers and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On June 17, 1997, Ladex Corporation (applicant) filed
application serial No. 75/310,166 to register the mark
SUNDAY'S BEST for goods ultimately identified as "frozen
shrimp sold through wholesale channels and only to
restaurant and other institutional and commercial buyers"
in International Class 29. The application was based on a
bona fide intent to use the mark in commerce. The
Examining Attorney refused to register the mark under

Section 2(d) of the Trademark Act because of prior Registration No. 1,394,229 for the mark SUNDAY BEST for "poultry" in International Class 29.¹ Both applicant's and registrant's marks are depicted in typed drawings.

After the Examining Attorney made the refusal final, this appeal followed. Both applicant and the Examining Attorney filed briefs and, at applicant's request, an oral hearing was held.

After considering the arguments of the applicant and the Examining Attorney, the Examining Attorney's refusal to register applicant's mark for its goods because applicant's mark, when used, would create a likelihood that consumers would be confused, mistaken, or deceived is affirmed.

In cases involving the issue of likelihood of confusion, we look to the relevant factors set out in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973), to determine whether there is a likelihood of confusion. Not all of the du Pont factors are applicable in every case. In re Dixie Restaurants, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

In this case, the first factor that we consider is whether the marks are similar. It is obvious, and

¹ Issued May 20, 1986. Section 8 and 15 affidavits have been accepted and acknowledged.

applicant does not contest, that the marks SUNDAY'S BEST and SUNDAY BEST, both typed drawings, are virtually identical, except that applicant adds an "'S" to the word "SUNDAY" in its mark. Applicant does not argue that this changes the sound, appearance or meaning of the mark.

Second, we now turn to whether applicant's goods (frozen shrimp sold through wholesale channels and only to restaurant and other institutional and commercial buyers) are related to registrant's goods (poultry). To determine whether the goods are related, we must look to the identification of goods in the application and registration. Dixie Restaurants, 41 USPQ2d at 1534; Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Although applicant limits its identification of goods to frozen shrimp, registrant's identification of goods is again not limited, and we must assume that registrant sells frozen poultry.

The Examining Attorney has made of record numerous third-party registrations that show that the same sources supply both poultry and shrimp under the same mark. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence

that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). These registrations, at a minimum, suggest that shrimp and chicken are distributed under the same mark from the same supplier. While shrimp and poultry are different products, we have no reason to disturb the Examining Attorney's finding that "these goods are clearly related" and that "it would be reasonable for purchasers to expect both types of goods to emanate from one entity under the same trademark." Brief at 4-5.

Third, we consider channels of trade for the involved goods and applicant's main argument that there are differences in the channels of trade. "[I]n view of the amendment to the identification of goods, Applicant's products move in restricted channels of trade with the result that the circumstances of sale would preclude a likelihood of confusion." Brief at 3. Applicant correctly argues that its goods are limited to wholesale purchase by restaurants and other institutional and commercial buyers and, thus, applicant distinguishes the circumstances under which the goods are purchased from those where retail

consumers purchase poultry and shrimp in supermarkets. However, limiting its goods to wholesale channels of trade and commercial and institutional purchasers does not mean that the goods are not related and confusion unlikely.

While applicant has limited its identification of goods to wholesale channels of trade, registrant's channels of trade are not limited by its identification of goods. Therefore, we must assume that the goods move through all normal channels of trade for the products. Here, we must assume that registrant's poultry moves through wholesale as well as retail channels of trade and that it would be purchased by restaurants and other commercial and institutional buyers. Indeed, we have no reason to assume that commercial purchasers of frozen shrimp would not also purchase poultry. Also, the third-party registrations of record suggest that these products are marketed under the same mark. The record does not indicate that this would not be true at the wholesale level.

Fourth, we consider sophistication of purchasers, another factor on which applicant relies. Even if we assume that wholesale purchasers of frozen shrimp and poultry are sophisticated purchasers, these sophisticated purchasers are likely be confused when virtually identical marks are used in connection with these related goods.

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Octocom Systems Inc. v. Houston Computer Services, 918 F.2d
937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Thus, when a buyer for a restaurant, who is familiar with the mark SUNDAY BEST for poultry, encounters the mark SUNDAY'S BEST for frozen shrimp, confusion would be likely.

Decision: The refusal to register is affirmed.